BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity Authorizing it to Construct, Own, Operate, Control, Manage, and Maintain a High Voltage, Direct Current Transmission Line and an Associated Converter Station Providing an interconnection on the Maywood-Montgomery 345 kV Transmission Line	)))))))	Case No. EA-2016-0358

SUPPLEMENTAL BRIEF OF THE
MISSOURI LANDOWNERS ALLIANCE

Pursuant to the Commission's Order of July 5, 2017, the Missouri Landowners Alliance (MLA) respectfully submits this Supplemental Brief on the three subjects identified by the Commission in that Order. Given the number of references here to the two subsections of Section 393.170 RSMo, Section 393.170.1 will be referred to as simply "Subsection 1", and Section 393.170.2 will be referred to as "Subsection 2."

1. Effect of the ATXI opinion on this case.

This issue is actually quite simple and straight-forward. The relevant facts in the ATXI case and in this case are identical, and thus the ATXI opinion from the Western District of the Missouri Court of Appeals is controlling here.

First, pursuant to Subsection 1, ATXI requested a "line certificate" from the Commission in Case No. EA-2015-0146 -- a fact the Western District was well aware of when it rendered its decision.[1]

[1] As ATXI told the Western District in its Initial Brief: "Because ATXI sought permission to construct and operate a transmission line and did not seek permission to exercise a franchise by serving customers, it sought a 'line certificate' under subsection 1 of [Section 393.170]. " ATXI's Initial Brief inWD79883, filed January 6, 2017, p. 22. (This document and all others cited herein from the appellate courts in the appeal of the ATXI case are available on Case.net). Similarly, the Commission told the Court that "The Commission found that in ATXI's case, both a line certificate and assent from the affected counties is

In this case, Grain Belt is also seeking a line certificate pursuant to Subsection 1.[2] So on this point, the two cases are identical.

The only other relevant factor in the ATXI decision was that ATXI had not secured the approvals pursuant to Section 229.100 from the County Commissions where the line was to be located.[3] The same is true for Grain Belt in this case.[4]

The Western District held unanimously that under these circumstances, the Commission could not lawfully issue a CCN.[5] The dispositive facts there are identical to those in the Grain Belt case, and thus the two cases cannot logically be distinguished. In Staff's words, "the salient facts here regarding Commission jurisdiction are no different than those in the … [ATXI] case."[6]

Accordingly, the decision by the Western District in the ATXI appeal is equally applicable here. It follows that the Commission may not lawfully grant a CCN to Grain Belt in this case, for the same reasons it could not lawfully grant one to ATXI.

In attempting to side-step the ATXI decision, in various pleadings Grain Belt (as well as MJMEUC) has advanced two somewhat related claims: (1) that Subsection 1contains no requirement that county assents be obtained before a CCN is issued; and (2) that Grain Belt is applying in this case for a line certificate under Subsection 1, and that

---

required." PSC's Initial Brief in WD79883, January 6, 2017, p. 17. And see also Commission's Motion for Rehearing in that same case, p. 2, filed April 12, 2017.

[2] Preamble to and Paragraph 1 of Grain Belt's Application, filed August 30, 2016. See also "Request of Grain Belt Express and Motion For Waiver or Variance of Filing Requirements", ("Request of Grain Belt") p. 2 par. 3, filed June 29, 2017.

[3] See ATXI Opinion in WD79883, slip opin. at 5.

[4] Grain Belt clearly lacks the consent from the Caldwell County Commission. See Exhibit 320, which includes an Order at page 4 from the Circuit Court sustaining the MLA's Motion to vacate the earlier consent granted to Grain Belt by that County Commission. In addition, a number of the County Commissions have since rescinded the consent given earlier to Grain Belt. See Schedule LDL-4 to Exh. 300, testimony of Louis Donald Lowenstein.

[5] "county commission assents required by section 229.100 and 4 CSR 240-3.105(D)(1) must be submitted to the PSC *before* the PSC grants a CCN…." No. WD79883 (March 28, 2017), slip opin. at 8. (emphasis by the Court)

[6] Staff's Supplemental Brief, p. 2.

because there is no discussion or analysis of that subsection by the Western District, the ATXI opinion is simply not applicable here.[7]

As to the first point, Grain Belt's claim that Subsection 1 does not require county consents is based on what it sees as a critical distinction between Subsection 1, related to line certificates, and Subsection 2, related to area certificates.[8] While Grain Belt acknowledges that Subsection 2 requires municipal consents before the CCN may be issued, it argues there is no similar requirement under Subsection 1 of the statute for line certificates.[9]

However, in the ATXI case the identical argument about the supposed distinction between Subsections 1 and 2 was explicitly rejected by the Commission, and implicitly rejected by the Court of Appeals.

In the Commission case, ATXI went to considerable lengths in making the same argument that Grain Belt is reiterating in this case: that where the utility is seeking a line certificate under Subsection 1, there is no requirement that it obtain the county commission consents before the Commission can grant the CCN.[10] In fact, as would be expected when making essentially the same argument, ATXI and Grain Belt have relied in large part on the same case law.[11]

[7] Request of Grain Belt, par. 3and 4; MJMEUC's "Response to Agenda Discussion Regarding Case Status", filed May 31, 2017, pp. 2-3; Notice of Opposition by Grain Belt Express, p. 2, filed July 1, 2017.
[8] Grain Belt's Initial Post-Hearing Brief, pp. 15-18.
[9] *Id.*
[10] Initial Post-Hearing Brief of ATXI, Case No. EA-2015-0146, pp. 60-74, EFIS No. 266.
[11] In their Initial Briefs to the Commission, both ATXI and Grain Belt rely for example on *Stop Aquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005); *State ex rel. Harline v. PSC*, 343 S.W.2d 177 (Mo. App. 1960); and *State ex rel. Cass Cnty. V. PSC*, 259 S.W.3d 544 (Mo. App. 2008) See e.g., ATXI's Initial Post-Hearing Brief at pages 62, 63 and 68, and Grain Belt's Initial Post-Hearing Brief at pages 14 and 19

In the Report and Order in the ATXI case, the Commission stated that it understood the argument being raised in this regard by ATXI.[12] However, the Commission went on to reject the argument, saying it was "loath to allow a utility a novel end run around statutorily required county commission approval simply because the utility would not serve retail customers."[13]

Grain Belt has added nothing in this case which would logically cause the Commission to reverse its position on this issue. So in short, Grain Belt's first argument here has already been rejected by the Commission.

In the appeal of the ATXI case to the Western District, ATXI again went to great lengths in making the same argument rejected by the Commission: that county consents are not a prerequisite to issuance of a CCN when the utility is seeking a line certificate under Subsection 1.[14] On the other hand, on appeal the Commission reaffirmed that it had rejected that argument.[15]

Although the Court did not explicitly address ATXI's position on this specific issue, it was obviously was well aware of the argument. Thus the very outcome of that case demonstrates that the Court must have rejected ATXI's position with respect to Subsection 1.

[12] Report and Order, p. 38.
[13] *Id*. at p. 39. For the record, the MLA believes that the Commission decision on this issue is supported by one additional point which the Commission did not discuss. When what is now Section 393.130 was originally enacted in 1913, it consisted of one long paragraph. (Sec. 1081, Laws 1913) As such, it was even more apparent that the phrase beginning at the second sentence of what is now subsection 2, "Before such certificate shall be issued", refers to both line certificates issued under what is now subsection 1 and area certificates issued under what is now subsection 2. The fact that the Revisers later divided the statute into three numbered subsections does not change the law's original meaning and intent. See *Protection Mutual Insurance Co. v. Kansas City,* 504 S.W.2d 127, 130 (Mo 1974).
[14] ATXI's Initial Brief in case No. WD79883, January 6, 2017, pp. 18-25.
[15] PSC's Initial Brief in case No. WD79883, January 6, 2017, p. 17.

Which leads to Grain Belt's second point: that because the Western District did not specifically address the argument regarding Subsection 1, the case simply does not apply here.

Although the Western District did not find it necessary to include an analysis of Subsection 1 in its opinion, it must have concluded that Subsection 1 does in fact require approval from the county commissions before a CCN may be issued. If that was not the case, the Commission would have been free to issue the CCN to ATXI, and the Western District's decision would necessarily have gone in ATXI's favor. So clearly, the only logical conclusion is that the Court rejected ATXI's argument about the need for the county consents under Subsection 1 in favor of that advanced by the Commission. This conclusion follows from the general rule that "what is contemplated in an opinion by necessary implication is equivalent to that which is clearly and expressly stated."[16]

This position also finds support from analogous situations where a court does not explicitly address a particular issue. For example, Supreme Court Rule 73.01(c) provides that when an appeals court is reviewing a decision by a trial court, "all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached."

And an appellate court decision becomes the law of the case not only with respect to matters decided by the court directly, but those decided by implication as well.[17]

Here, by "necessary implication" the Western District must have rejected ATXI's argument regarding Subsection 1. That facet of the decision is therefore just as meaningful and just as binding as if it had been explicitly enunciated in the opinion.

[16] *Frost v. Liberty Mutual Ins. Co.*, 813 S.W.2d 302, 305 (Mo banc 1991)
[17] *Fischer v. Brancato*, 174 S.W.3d 82, 86 (Mo. App. 2005); *Missouri Board of Pharmacy v. Tadrus*, 926 S.W.2d 132, 137 (Mo. App. 1996)

In addition, the supposed distinction raised here by Grain Belt between Subsections 1 and 2 was raised again by ATXI in its Motion to Transfer with the state Supreme Court.[18] The Supreme Court may transfer a case from the Court of Appeals if it involves a matter of general interest or importance, or for the purpose of reexamining existing law.[19] And the Supreme Court always carefully considers the applications for transfer, and will order transfer if it sees fit.[20]

In the ATXI appeal, the Supreme Court obviously did not see fit to review the argument regarding the supposedly differing requirements of the two subsections of 393.170. Instead, it chose to let the opinion from the Western District stand.

By inviting the Commission to ignore the ATXI decision, Grain Belt is asking the Commission to countenance directly opposite results in two comparable proceedings: ATXI is denied a line certificate because it does not have the county consents, while Grain Belt is granted a line certificate even without those consents. The outcome of Grain Belt's position is inherently illogical.

The bottom line is that whatever Grain Belt and its supporters may think of the ATXI opinion, it is the law. And pursuant to that decision, the Commission may not grant a CCN under Subsection 1 unless the utility has first acquired the necessary county consents under Section 229.100.

2. Grain Belt's Request for Waiver or Variance.

As the Western District pointed out, a utility is required to secure the needed county consents not only by virtue of Section 393.170, but also by reason of the

[18] ATXIs Motion to Transfer, SC96427, May 16, 2017, p. 5-9.
[19] Supreme Court Rules 83.04 and 83.02.
[20] *China Worldbest Group v. Empire Bank,* 373 S.W.3d 9, 17 (Mo App 2012).

Commission's own Rule.[21] Grain Belt argues that the statutory requirement does not apply, and then asks the Commission to waive the Rule which is derived from the statute.[22]

Stated another way, Grain Belt is asking the Commission to waive its Rule which requires the filing of the county consents in order that Grain Belt may circumvent the Commission's ruling in the ATXI case which said those consents are required. This, we are to believe, constitutes "good cause" for the waiver.

The basic flaw in Grain Belt's request is that if Section 393.170 means what the Western District says it means (and by definition it does) then even if Grain Belt could convince the Commission to ignore its recent ruling in the ATXI case, the statutory provision would still act to bar the issuance of the CCN. So the request for the waiver is a meaningless exercise.

As part of the waiver request, Grain Belt claims that as used in Section 393.170, the term "municipal authorities" does not include counties.[23] Notably, ATXI did not bother to raise this argument either with the Commission or on appeal to the Western District.[24] But in finding in that case that Section 393.170 does require the consent of the county commissions, the PSC must have believed that the term "municipal authorities" includes the county commissions."[25] Regardless, as discussed in the MLA's Motion to Dismiss, Grain Belt's argument on this point is without merit.[26]

---

[21] Slip Opin. p. 8.
[22] Request of Grain Belt, pp. 4-5.
[23] Request of Grain Belt, p. 5 par. 11.
[24] See ATXI's Initial Post-Hearing Brief to the PSC, pp. 60-74, EFIS No. 266; and ATXI's Brief to the Western District, Case No. WD79883, pp. 15-33.
[25] Report and Order, April 27, 2016, p. 38.
[26] MLA's Motion to Dismiss Application, pp. 4-5.

Grain Belt also argues that the Commission has routinely granted CCNs on the condition that the utility obtains the governmental consents at a later date.[27] Apparently, that has not always been the case, at least with respect to CCNs for area certificates.[28] In any event, even though a utility acts in reliance on a long-standing Commission interpretation of Section 393.170, if that interpretation is later deemed incorrect by the courts then the utility is not saved by reason of its reliance on Commission precedent.[29] As the courts have stated, the Commission may not relieve a utility from the "self-inflicted dilemma" which it brought upon itself by misconstruing the law.[30]

One of Grain Belt's selling points to the Commission is that "the Project's developers have assumed the risk of failure."[31] The risk of failure would of course include the risk of not obtaining the county consents in a timely manner. The MLA respectfully submits that in fairness to the other parties, the Commission should not assist Grain Belt in dodging a risk which it claimed it was assuming.

3. The MLA's Motion to Dismiss.

The principal point made by the MLA in its July 4, 2017 Motion to Dismiss was that the holding in the ATXI case was directly applicable to the Grain Belt case. That issue was already addressed above, and will not be further discussed here.

The MLA also pointed out in its Motion to Dismiss that Grain Belt has been working for five years now to secure the needed county consents, but has been unable to

[27] Request of Grain Belt, par. 13, p. 5-6.
[28] See *Re S.W. Water Co.,* 25 Mo P.S.C. 63, 638 (1941), summarized by Staff in their Initial Brief in the ATXI case, EA-2015-0146, p. 27-28.
[29] *StopAquila.org v. Aquila, Inc.,* 180 S.W.3d 24, 36-37 (Mo App 2005). Aquila was found in that case to have improperly built a generating facility within its existing service territory, relying on a long-standing Commission interpretation of Section 393.170 deemed incorrect by the court.
[30] *State ex rel. Cass County v. PSC,* 259 S.W.3d 544, 551 (Mo App 2008).
[31] Grain Belt's Initial Brief in this case, p. 36.

do so.[32] The consent from the Caldwell County Commission was voided by the courts more than a year and a half ago.[33] Yet Grain Belt still has been unable to obtain that consent – if they have even bothered to try. Also, for two-and-a half years, Grain Belt has been promising that all of the required consents would be submitted to the Commission "once they have been received."[34]

So how many county consents does Grain Belt still need? It has carefully avoided answering that question, saying only that it "has obtained several county commission assents and will complete the approval process with other county commissions [plural]…."[35] Presumably, the other parties are supposed to patiently wait while Grain Belt attempts for some unspecified period of time to secure additional approvals from some unspecified number of unsympathetic county commissions.

In that regard, the Commission's Rules state that a case is deemed submitted for consideration after the close of the evidence, or if applicable, after the filing of briefs and the presentation of oral argument.[36] And the Commission order in the case is to be issued "as soon as practicable after the record has been submitted for consideration."[37]

Commission Rules have the force and effect of law.[38] Accordingly, the Commission is "compelled to comply with its rules duly promulgated pursuant to properly delegated authority…."[39]

---

[32] Motion to Dismiss, p. 6 and f.n. 17.
[33] See Order from the Circuit Court at 4th page of Exh. 20.
[34] Grain Belt's Initial Post-Hearing Brief in case No. EA-2014-0207, December 8, 2014, p. 54. EFIS No. 470. See also Grain Belt's Initial Post-Hearing Brief in this case, p. 23, EFIS No. 529, where it reiterates that same promise.
[35] Grain Belt's Initial Brief in this case, p. 22.
[36] 4 CSR 240-2.150(1).
[37] 4 CSR 240-2.150(2).
[38] *State ex rel. Missouri Gas Energy v. PSC,* 210 S.W. 3d 330, 337 (Mo. App. 2006).
[39] *See Prenger v. Moody,* 845 S.W.2d 68, 78 (Mo. App. 1992).

This means that an order is to be issued in this case as soon as practicable after the oral argument scheduled for August 3, 2017. The Rules clearly do not contemplate the grant of yet additional time for Grain Belt to meet the statutory requirements which it should have satisfied before the close of the evidence in this case.

In particular, the Commission's Rules do not contemplate the issuance of an interim "advisory opinion" on the merits of the *Tartan* criteria, pending a final Report and Order disposing of the case. And "as soon as practicable" cannot possibly mean the months or perhaps years it could take for Grain Belt to obtain the needed county consents -- if indeed it is ever able to do so. It is well past time for Grain Belt to produce, and to hopefully put an end to the disruption in the lives of so many people in northern Missouri.

In the 2014 case, the MLA quoted the Missouri Supreme Court for the well-recognized proposition that "justice delayed is justice denied."[40] That phrase could have been penned with this case in mind. For the past five years, the very prospect of the Grain Belt project has taken a heavy toll on nearby landowners as they wait for this matter to be resolved.[41] And during the two years since the 2014 case, the monetary and emotional damages have continued to mount. Thus the Supreme Court's observation about the onerous impact of delay is even more compelling now than it was two years ago. One way or another, this case should linger no longer.

Accordingly, the MLA respectfully asks the Commission to issue a final order in this case as soon as practicable after the oral argument on August 3. At this point, the ATXI opinion and Grain Belt's own shortcomings have left the Commission with no

[40] *Brooks v. State*, 128 S.W.3d 844, f.n. 7 (Mo banc 2004).
[41] See Response of the MLA to Recommendations of Grain Belt to Hold Case in Abeyance, Case No. EA-2014-0207, pp. 7-9, EFIS No. 54; and the MLA's Initial Post-Hearing Brief in this case, pp. 35-48.

choice but to dismiss the application, whether or not a majority feels that Grain Belt has met the *Tartan* criteria.

WHEREFORE, the MLA respectfully renews its request that the Commission promptly dismiss the application filed in this case by Grain Belt on August 30, 2016.

/s/ Paul A. Agathen
Paul A. Agathen
Attorney for the Missouri Landowners Alliance
485 Oak Field Ct.
Washington, MO 63090
(636)980-6403
Paa0408@aol.com
MO Bar No. 24756

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 18th day of July, 2017.

/s/ Paul A. Agathen
Paul A. Agathen